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No. 88-1500

In The

Supreme Court of the United States

October Term, 1988

LONE STAR STEEL COMPANY

Petitioner,

vs.

GLENN UFFELMAN

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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2. Glenn Uffelman, Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Glenn Uffelman, respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the Court of Appeals for the Fifth Circuit's opinion in this case. That opinion is reported at 863 F.2d 404 (5th Cir. 1989).

STATEMENT OF THE CASE

Respondent Glenn Uffelman brought an action pursuant to the Age Discrimination in Employment Act

(ADEA), 29 U.S.C. §621, *et seq.*, against Petitioner Lone Star Steel Company ("Lone Star") for his unlawful discharge. Based on the jury's findings that Lone Star willfully terminated Mr. Uffelman because of his age, the District Court for the Eastern District of Texas entered judgment in favor of Respondent. The district court denied Lone Star's Motion for Judgment Notwithstanding the Verdict.

Uffelman after twenty years experience as a production engineer was hired as a staff engineer for Lone Star Steel Company in 1975 when he was fifty-one years of age. Petitioner's Appendix at A-3 (hereinafter Pet. App.). In 1982, a new manager was hired to head the engineering department. Because of a business decline the new manager decided to reorganize the engineering department by eliminating the construction engineering section in which Plaintiff was assigned (Pet. App. A-4). As part of the planned reorganization Lone Star Steel utilized an evaluation procedure which deviated from the company's standard evaluation policy, (Pet. App. A-11) and failed to develop objective job descriptions called for in the plan (Pet. App. A-4); resulting in the termination of 60% of the engineers over 60 years of age. (Pet. App. A-4). Thus, out of five engineers over age 60, plaintiff and two other engineers over 60 were terminated. Nine of the employees over 40 were terminated while only one of the 24 employees under 40 was terminated. (Pet. App. A-8)

Additionally, in support of his contention that the termination was in willful violation of the ADEA Plaintiff proved that Lone Star Steel was attempting to avoid the expense of paying him his retirement pay. Although he had reached age 60, he lacked 9 months of the ten years

required for vesting under the Lone Star Steel retirement plan when terminated. (Pet. App. A-8)

On appeal, the Court of Appeals for the Fifth Circuit affirmed the lower court's opinion in its entirety. The Court of Appeals held that the evidence was sufficient to support 1) the jury's finding that age was a determinative factor in Lone Star's decision to terminate Uffelman and 2) a finding of willfulness. With respect to the standard for "willfulness" invoked by the District Court, the Court of Appeals specially noted that Respondent had prevailed even though the lower court instructed the jury according to the "outrageous" conduct test – "the most stringent standard [for willfulness] adopted by any circuit."

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE OPINION OF THE COURT OF APPEALS IS A WELL CONSIDERED AND RESPONSIBLE APPLICATION OF SETTLED LAW, AND IT SHOULD NOT BE REVIEWED ON CERTIORARI

Review by Writ of Certiorari in the Supreme Court of the United States is not a matter of right. Rule 17 of the Rules for the Supreme Court sets out the criteria to be used in determining whether review by the Supreme Court is necessary or proper in a given case. The decision below does not involve an area of unsettled law and did not depart from established precedent. This case does not merit further review.

Petitioner in its Petition for Writ of Certiorari expresses dissatisfaction with the Court of Appeal's use

of the *Thurston* standard for resolving the issue of "willfulnesss" under the ADEA. *See* Pet. App. at 1. Petitioner fails to identify any alternative to the "knowing or reckless disregard" standard as the appropriate test in ADEA cases; presumably, Petitioner would have the Court apply the most stringent test available, namely the "outrageousness" standard invoked by the Court of Appeals for the Third Circuit in *Dreyer v. Arco Chem. Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Yet the peculiarities of this case confirm that application of a test that far exceeds the *Thurston* standard, such as the *Dreyer* test, would provide no relief to Petitioner.

For whatever reason, the District Court in this case actually instructed the jury that in addition to finding a knowing or reckless violation of the ADEA, it had to find "that the Defendant engaged in outrageous conduct beyond mere violation of the [ADEA]" in order to find willfulness. *See* (Respondent's Appendix A). The jury so found and awarded Mr. Uffelman liquidated damages. On review, the Court of Appeals for the Fifth Circuit held that the facts before the jury were sufficient to entitle it to find that Lone Star willfully terminated Mr. Uffelman. See *Lone Star Steel Co. v. Uffelman*, 863 F.2d 404, 410 n.5 (5th Cir. 1989). Thus, the appellate court fully considered Petitioner's dissatisfaction and ruled that the trial court's judgment was correct. In accord with this Court's policy, it should not undertake to review concurrent findings of fact by two courts below. See *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949).

II. THIS COURT HAS ESTABLISHED THAT THE THURSTON STANDARD IS THE APPROPRIATE STANDARD IN DETERMINING WILLFULNESS UNDER §626(b) OF THE ADEA AND HAS ARTICULATED CLEARLY THE CONTOURS OF THAT TEST SO THAT NO DOUBT CAN REMAIN AS TO ITS MEANING

Petitioner has attempted to manufacture a conflict between the Third, Fourth, Sixth, Tenth and Eleventh Circuit Courts of Appeals to support its application for certiorari, see *Petition for a Writ of Certiorari* at 5-6, by identifying differences in semantics in the opinions of these courts. For this reason, Petitioner finds the lower federal courts' use of the *Thurston* "knowing or reckless disregard" standard in ADEA actions to be a controversy of national import even though this Court long-since ended controversy on this issue in *McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677, 100 L.Ed. 2d 115 (1988).

Immediately following the Court's pronouncement in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) that a violation of the ADEA is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," 469 U.S. at 128-29, the courts of appeals began applying *Thurston* to discrete fact situations. For a short time, the courts of appeals experimented with different, yet consistent, interpretations of the "knew or showed reckless disregard" standard. For example, in the first relevant appellate decision following *Thurston*, the Court of Appeals for the Fourth Circuit in *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429 (4th Cir. 1987), reversed a district court's jury instruction because it was similar to the "in the picture" standard rejected in *Thurston*. Over time, although they used different wording, the courts of

appeals recently concluded, "every other circuit, except the Third Circuit, that has addressed willfulness in ADEA cases has adopted the 'knew or showed reckless disregard' standard approved by the Supreme Court in *Thurston*." See *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834, (7th Cir. 1988). In 1986, acting alone, the Court of Appeals for the Third Circuit adopted a relatively more stringent standard of "outrageousness" for awarding liquidated damages in ADEA suits. Thus, contrary to the picture of calamity presented by Petitioner, the post-*Thurston* and pre-*McLaughlin* period was marked by overwhelming consistency amongst the courts of appeals as to the interpretation of the "knew or showed reckless disregard" standard – regardless of whether the particular suits involved disparate treatment or disparate impact.

If any questions concerning the meaning of the *Thurston* standard did exist, this Court resolved those questions in its May 1988 *McLaughlin* decision. First, the Court in *McLaughlin* reiterated its support for the willfulness standard enunciated in *Thurston*. Therefore, Petitioner's present doubt that the *Thurston* test is the appropriate liquidated-damages test to be applied by the federal courts in ADEA cases is misplaced. Second, the Court in *McLaughlin* gave further definition to the term "willful." The Court clarified that willful conduct under *Thurston* requires more than mere negligence. It required recklessness. Due to *McLaughlin*, any differences of interpretation of the *Thurston* standard amongst the courts of appeals now are purely semantic. The Court of Appeals for the Third Circuit indeed may continue to use the term "outrageousness"; however, after *McLaughlin*, reckless conduct on the part of employers will prove sufficient to

meet the "outrageousness" standard in liquidated damages assessments in ADEA cases.

Due to clarification by this Court in *McLaughlin*, today no important difference amongst the courts of appeals can remain in interpreting the standard for "willfulness" set forth in *Thurston*. Indeed, those courts of appeals that have passed on the issue of willfulness under the ADEA since the *McLaughlin* decision unanimously have adopted its interpretation of *Thurston*. See, *e.g., PFORR v. Food Lion, Inc.*, 851 F.2d 106 (4th Cir. 1988); *Rengers v. WCLR Radio Station*, 857 F.2d 363 (7th Cir. 1988); *Brock v. Shirk*, 860 F.2d 1545 (10th Cir. 1988). Even in this particular case, the Court of Appeals for the Fifth Circuit reviewed the district court's finding of willfulness in light of the Supreme Court's pronouncement in *McLaughlin*. See *Uffelman*, 863 F.2d at 409. Therefore, it is quite curious that Petitioner herein fails to mention *McLaughlin* – clearly the controlling authority in this field – in its Petition for Writ of Certiorari.

Petitioner further argues that this case presents the question of whether the Supreme Court's decision in *Thurston* is applicable to cases of disparate treatment, or only to cases of disparate impact. This Court's very recent reiteration of support for the *Thurston* test eliminates any doubt that it constitutes the sole, appropriate standard for determining an employer's liability for liquidated damages under §626(b) of the ADEA. Thus, an employer, unlike the Petitioner herein, who adopts criteria which adversely impact whether recklessly or knowingly in order to discriminate against an employee, acts willfully as defined by this Court in *Thurston* and as affirmed recently in *McLaughlin, supra*.

CONCLUSION

For these reasons, the Respondent prays that the Petition for Writ of Certiorari be DENIED and that Respondent be awarded double costs and fees based upon Petitioner's bad faith filing.

Respectfully submitted,

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RESPONDENT'S APPENDIX – A

To establish a willful violation, the Plaintiff must prove by a preponderance of the evidence the following two elements: first, that the Defendant knew that its termination of the Plaintiff violated the law, or that the Defendant showed reckless disregard for whether its conduct was violative of the law; and, two, that the Defendant engaged in outrageous conduct beyond mere violation of the Age Discrimination In Employment Act.

In making your determination of whether there was a willful violation, you may consider any evidence that the Defendant has offered to show that it acted in good faith and upon reasonable grounds for believing that its actions were not in violation of the law. If the employer can show such good faith, then the employer's violation of the law was not willful.

Excerpt Court's Instructions to the Jury (V.4. p. 289)